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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	Case No. CR-15-0366 CRB
)	
Plaintiff,)	THE UNITED STATES'
)	SENTENCING MEMORANDUM
v.)	
)	Date: December 16, 2015
VINCENTE EDUARDO GARCIA,)	Time: 10:00 a.m.
)	Court: Hon. Charles R. Breyer
Defendant.)	

INTRODUCTION

The United States respectfully submits this Sentencing Memorandum pursuant to Federal Rules of Criminal Procedure 32 and Criminal Local Rule 32-5(b). From 2009-2013, the defendant, Vincente Garcia, was a Vice President of Global and Strategic Accounts at SAP International, Inc. ("SAP"), focused on sales in Latin America. During that period, the defendant conspired with others to bribe

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1 government officials in Panama in order to win a \$14.5 million contract from the Panamanian
 2 government, which included the sale of approximately \$2.1 million in SAP software. As part of this
 3 sophisticated scheme, the defendant arranged for a sham consulting agreement, through which \$1.5
 4 million in bribes were to be paid directly and indirectly to senior Panamanian officials. The defendant
 5 also personally received approximately \$85,965 as a kickback from the proceeds paid by the
 6 government of Panama for the software. November 30, 2015 Presentence Investigation Report ("PSR")
 7 at ¶¶ 18 and 20.

8 The November 2015 United States Sentencing Guidelines ("U.S.S.G." or "Sentencing
 9 Guidelines") advise sentencing the defendant to a 60 month term of imprisonment, which is the statutory
 10 maximum for the offense of conviction. *See*, U.S.S.G. § 5G1.1(a). Consistent with 18 U.S.C. 3553(a),
 11 the United States respectfully requests that the Court impose a term of imprisonment sufficient, but not
 12 greater than necessary, to reflect the seriousness of the crime, afford adequate general deterrence, and
 13 otherwise comply with the enumerated factors. Because the defendant has already agreed to pay
 14 disgorgement of at least \$85,965 in the parallel enforcement action brought by the United States
 15 Securities and Exchange Commission ("SEC"), the United States does not seek asset forfeiture in this
 16 criminal case. *See*, August 12, 2015 Plea Agreement at ¶ 14.

17 **SUMMARY OF THE OFFENSE CONDUCT**

18 The defendant, Vincente Garcia, worked in the technology industry. In 2008, after working for
 19 another global technology company in a high-level sales executive role, he joined SAP International,
 20 Inc., in Miami, Florida, where he focused on sales in Latin America. SAP International, Inc. was a
 21 subsidiary of SAP A.G., the global information-technology company. SAP is a major tech provider with
 22 offices in Palo Alto, California, in the Northern District of California. At SAP International, the
 23 defendant was Vice President of Global and Strategic Accounts, responsible for SAP's sales to its most
 24 important clients in the region.

25 Beginning in early 2009, the defendant's superiors at SAP expressed an interest in expanding
 26 SAP's presence in Central America, including Panama. In mid-2009, he was contacted by a
 27 Panamanian technology lobbyist with a consulting firm ("Consultant A") about the Panamanian

1 government's desire to upgrade its technology platforms across various government agencies. The
2 defendant had known Consultant A for several years. In September 2009, Consultant A arranged for
3 him to meet in Panama with a high-level Panamanian government official ("Official A") who had
4 substantial influence over the award of technology-related contracts by the Panamanian government. At
5 the meeting, he discussed how SAP's products were relevant to Panama's desired technical upgrades.

6 In November 2009, the defendant flew from Miami to Panama to meet with Consultant A,
7 Official A, and a second high-level Panamanian government official ("Official B"), who had substantial
8 influence over the award of technology-related contracts at the Panamanian government agency where
9 Official B worked. Official B's agency was planning a multi-million dollar tender to upgrade its
10 technology platform (the "Contract"). The defendant believed that if it won the Contract, SAP would be
11 favored to win future technology contracts with the Panamanian government. He eventually estimated
12 that the total spending by the Panamanian government for such contracts could be over \$100 million.

13 In early February 2010, Official A, through Consultant A, asked if the defendant would have
14 SAP arrange a "fictional" business trip for Official A to Mexico. Official A really just wanted to take a
15 recreational trip to Mexico. The defendant agreed to do so and approved an invitation letter for Official
16 A on SAP letterhead for fictitious meetings in Mexico. The defendant provided this favor for Official
17 A, with the intent that it would help SAP win future Panamanian government business, including the
18 Contract.

19 Later in February 2010, the defendant traveled again from Miami to Panama and met with
20 Consultant A, Official A, a former subordinate of his at SAP, who was planning on leaving SAP
21 ("Advisor"), and another individual ("Partner"), who owned a Mexico-based company ("Channel
22 Partner") that sold SAP products in Mexico. Channel Partner wanted to enter the Panamanian
23 technology market. Also during this trip, the defendant was introduced to a lobbyist ("Agent"), who
24 was a close relative of a high-level Panamanian government official ("Official C"), who had substantial
25 influence over the award of Panamanian government contracts.

26 Agent told the defendant that Agent could facilitate Channel Partner's and SAP's business with
27 the Panamanian government. Based upon discussions with Agent during this meeting, as well as
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1 subsequent discussions with Consultant A, the defendant understood that it would be necessary to pay
2 Agent money for bribes to Panamanian officials in order for SAP or Channel Partner to be awarded any
3 government contracts. As a result, the defendant agreed to help pay Agent so that Agent could do
4 whatever was necessary to help secure the contract for SAP, including paying bribes.

5 In March 2010, Consultant A – on behalf of the defendant, Partner, Advisor, Consultant A, and
6 Consultant's A's partner ("Consultant B") – reached an agreement with Official A and Agent to pay
7 bribes for the upcoming tender on the Contract. Specifically, the agreement provided that Official A
8 would receive 2% of the Contract and Agent 10%. The defendant understood at this time that Official B
9 might need to be paid as well. Agent was paid by Channel Partner through a consulting contract for fake
10 services. A few months later, the defendant received from Consultant B a draft of that sham contract,
11 which obligated Channel Partner to pay Agent 10% of the value of any contracts between Channel
12 Partner and the Panamanian government.

13 It was later determined that Channel Partner would bid directly on the Contract, reselling SAP
14 products. The defendant agreed with Consultant A, Partner, and others that the defendant would
15 persuade his colleagues at SAP to approve substantial discounts on SAP products resold by Channel
16 Partner for the Contract. The discounts by SAP assisted Channel Partner in making the illegal payments
17 to Official A and Agent. The defendant also agreed with Consultant A, Advisor, and Partner that they
18 would personally pay the defendant approximately 1% of the Contract as a kickback for his corrupt
19 efforts. Because he knew it was wrong, the defendant did not disclose this side agreement to SAP. As
20 negotiations on the Contract continued later in 2010, the defendant agreed with Official A that he should
21 receive a \$150,000 bribe for the Contract. Advisor also agreed at this time to pay Official B a bribe for
22 the Contract.

23 In January 2011, Channel Partner was awarded the Contract for \$14.5 million. Of that amount,
24 in 2011 and 2012, SAP received approximately \$2.1 million in total from Channel Partner for the SAP
25 software licenses it resold under the Contract. The money paid to SAP by Channel Partner was
26 positively factored into the defendant's 2011 and 2012 job performance at SAP.

27 The Contract was implemented over the course of approximately three years. The Defendant
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1 knew that Consultant A, along with Consultant B, would pay Official A approximately \$150,000. He
 2 understood that Advisor would pay Official B some amount even if he did not know exactly how much.
 3 The defendant further knew that Partner agreed to pay Agent 10% of any contracts awarded by the
 4 Panamanian government to Channel Partner and that Agent was a close relative of Official C, a very
 5 senior Panamanian official. The defendant believed that paying the bribes was necessary to win the
 6 Contract, as well as to potentially win additional contracts planned by the Panamanian government.
 7 Furthermore, although he did not ultimately receive a full 1% of the Contract, the defendant was paid
 8 \$85,965 as a kickback, which he received by international wire transfer to bank accounts in the United
 9 States. *See generally*, PSR at ¶¶ 5-22.

10 **GUIDELINE CALCULATIONS**

11 “Under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing
 12 Guidelines issued by the United States Sentencing Commission that are ‘in effect on the date the
 13 defendant is sentenced,’” except where it would violate the *Ex Post Facto* Clause. *Peugh v. United*
 14 *States*, 133 S. Ct. 2072, 2081 (2013). Using the current, November 2015, Sentencing Guidelines, the
 15 United States Probation Office correctly calculated that the total offense level is 31. This sentencing
 16 guideline calculation is consistent with the guideline calculation agreed to by the parties in the August
 17 12, 2015 Plea Agreement. If Criminal History Category I is applied, the resulting sentencing range is a
 18 term of imprisonment of 108 to 135 months. However, the maximum sentence for the only count of
 19 conviction is “not more than five years” or 60 months. *See* 18 U.S.C. §371. Therefore, pursuant to
 20 U.S.S.G. § 5G1.1(a), the resulting sentencing guideline range is 60 months.

21 **THE FACTORS IN 18 U.S.C. § 3553(a) WARRANT A TERM OF IMPRISONMENT**

22 The overarching goal of a sentencing court is to impose a sentence that is sufficient to “reflect
 23 the seriousness of the offense, promote respect for the law, and provide just punishment; to afford
 24 adequate deterrence; to protect the public; and to provide the defendant with needed education or
 25 vocational training, medical care, or other correctional treatment.” *United States v. Ressaam*, 679 F.3d
 26 1069, 1088-89 (9th Cir. 2012)(*en banc*); 18 U.S.C. § 3553(a)(2).

27 Here, that goal is best accomplished by imposing a term of imprisonment, the duration of which

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1 should be sufficient, but not greater than necessary, to reflect the seriousness of the crime, afford
 2 adequate general deterrence, and otherwise comply with the factors in 18 U.S.C. 3553(a). *See, e.g.,*
 3 *United States v. Granados*, Case No. CR 10-20881 JAL (S.D. Fl. September 8, 2011)(former CEO of
 4 Florida-based telecommunications company sentenced to 46 months in prison following his plea to one
 5 count of conspiracy to violate the FCPA in a \$500,000 scheme to bribe officials in
 6 Honduras)(government sentencing memorandum and judgment attached as Exhibits A and B); and
 7 *United States v. Warwick*, Case No. CR-09-447 HEH (E.D. Va. June 25, 2010)(defendant sentenced to
 8 37 months in prison following his plea to one count of conspiracy to violate the FCPA in a scheme to
 9 bribe government officials in Panama for the purpose of securing maritime contracts)(government
 10 sentencing memorandum and judgment attached as Exhibits C and D).

11 In deciding what sentence is appropriate to impose, the government encourages the Court to
 12 consider the following conduct by the defendant. First, when the FBI first contacted him, the defendant
 13 agreed to make voluntary statements that reflected a willingness to accept responsibility. In his
 14 subsequent meetings with the government, the defendant continued to forthrightly acknowledge his
 15 wrongdoing. Second, the defendant worked hard to cooperate with the government. He spent a great
 16 deal of time reviewing documents and answering questions that assisted the government in
 17 understanding the details of a complex, far-reaching, international crime. To date, the government has
 18 not been able to prosecute the other persons who share responsibility for the commission of this crime.
 19 That is certainly not the defendant's fault. To the contrary, the defendant has done everything within his
 20 power to cooperate with the government's investigation and the government asks the Court to please
 21 weigh that fact in the defendant's favor. Finally, the defendant committed this crime after a long career
 22 and a law-abiding life. PSR at ¶44. Under the circumstances of this case, the need for specific
 23 deterrence or a sentence that protects the public from further crimes by this defendant is, in the judgment
 24 of the government, remote. 18 U.S.C. §3553(a)(2)(C).

25 While certain considerations may support a variance, the amount of the kickback received by the
 26 defendant does not. Respectfully, the government disagrees with the PSR's suggestion that the
 27 substantial difference between the amounts of money gained by the defendant personally and the total
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1 loss used for the guideline calculation may warrant a variance. PSR at ¶100. It does not.

2 For purposes of the guideline calculation, the loss for a bribery-related offense includes the
 3 benefit received or to be received in return for the bribe payment. *See*, Sentencing Guidelines,
 4 §2C1.1(b)(2). *See also*, *United States v. Cohen*, 171 F.3d 796, 803 (3d Cir. 1999)(“‘improper benefit’
 5 refers to the net value accruing to the entity on whose behalf the individual paid the bribe.”); *United*
 6 *States v. Lianidis*, 599 F.3d 273, 283 (3d Cir. 2010)(rejecting the district court’s use of the defendants’
 7 salaries as the “benefit received” and holding that “the proper calculation of ‘benefit received’ under
 8 U.S.S.G. § 2C1.1(b)(2) is the net value, minus direct costs, accruing to the entity on whose behalf the
 9 defendant paid the bribe.”); *United States v. Kinter*, 235 F.3d 192, 197 (4th Cir. 2000)(“[W]e join all of
 10 the other circuit courts that have considered the issue, which have uniformly held that when a
 11 middleman defendant acts on behalf of a third-party payer of the bribe, the district court may consider
 12 the payer’s bribe-generated benefits when calculating the ‘benefit received’ under U.S.S.G. § 2C1.1, as
 13 long as those profits were reasonably foreseeable or the result of acts aided, abetted, counseled,
 14 commanded, induced, procured, or willfully caused by the defendant.”); and *United States v. Montani*,
 15 204 F.3d 761, 770 (7th Cir. 2000)(noting that “the value should be considered as a *whole*, not as
 16 individual shares to each co-conspirator”).

17 Here, more than \$1.5 million in total bribes were paid to secure a \$14.5 million contract, and the
 18 benefit SAP received as a result of the bribe scheme was \$2.1 million, the price of the software sold to
 19 the Panamanian government (PSR at ¶14). Thus, loss, for the purposes of the Sentencing Guidelines, is
 20 more than \$1.5 million and less than \$3.5 million (PSR ¶30). That the defendant enriched himself with
 21 the kickback in the course of the bribery scheme is an aggravating factor that is separate from – not a
 22 substitute for – the correct calculation of the loss pursuant to U.S.S.G. §2C1.1(b)(2) and §2B1.1(b)(1)(I).

23 If the Court decides to grant a variance in this case, it should be for the right reasons and the
 24 kickback is not one of them.

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CONCLUSION

For the reasons set forth herein, the United States respectfully requests that the Court impose a term of imprisonment sufficient, but not greater than necessary, to reflect the seriousness of the crime, afford adequate general deterrence, and otherwise comply with the factors in 18 U.S.C. 3553(a).

Dated: December 9, 2015

Respectfully submitted,

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/s/

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